Compugates Sabah Sdn Bhd v ETI Tech (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-11BC-04–09 OF 2017
DARRYL GOON JC
26 APRIL 2018

Companies and Corporation — Scheme of arrangement — Approval by the court — Appellant filed proof of debt — Appellant contended that respondent breached scheme of arrangement — Appellant claimed for monies due and owing to appellant by respondent — Whether appellant entitled to claim outstanding amount due — Companies Act 1965 s 176

Contract — Claims — Claim for debt — Respondent proposed scheme of arrangement — Appellant as creditor filed proof of debt — Appellant alleged that respondent breached scheme of arrangement — Appellant claimed for monies due and owing to appellant by respondent — Whether appellant entitled to claim outstanding amount

The appellant was a local incorporated company providing services for several of the respondent's projects. The services were evidenced by debit notes amounting to RM91,184.86. In March 2014, the respondent sought to restructure its debt by proposing a scheme of arrangement for its creditors under s 176 of the Companies Act 1965. The appellant then filed a creditor's proof of debt amounting to RM200,000. Under the scheme, the appellant was entitled of its debt claimed of RM200,000 by way of: (a) a cash settlement of RM56,343; (b) allotment of 1,436,574 new shares in the respondent of RM0.10 each; and (c) 1,077,431 number of free warrants. However, the respondent failed to pay the appellant the sum of RM56,324.57 within the time provided in the scheme. The payment was only made on 11 August 2016 which was after the writ of the present action was issued and after the statement of claim was filed and served. The appellant's claim at Kuala Lumpur Magistrate Court was for an amount of RM91,184.86. Only RM3,761.37 was allowed by the learned magistrate. The balance of RM87,423.49 was the subject matter of the present appeal.

Held, dismissing the appeal with costs of RM10,000:

(1) The appellant's original claim against the respondent were for the payment of monies due and owing to the appellant. The amount owed was declared by the appellant to be RM200,000. The appellant could not now be allowed to deny what it had declared, on oath, to be the sum owed by the respondent. The fact that RM91,184.86 owed to the appellant by

the respondent was not included in the appellant's proof of debt was not due to any fault on the part of the respondent, but it was due to the appellant's own oversight. What was clear was that the appellant wanted to keep what was paid to it under the scheme and, at the same time, wanted to be freed of the scheme to be able to make claims that it had overlooked to provide for in the proof of debt. The appellant could not be inconsistent. This would be like running with the fox and hunting with the hounds (see paras 27–28 & 30).

[Bahasa Malaysia summary

Perayu merupakan sebuah syarikat tempatan yang menyediakan pekhidmatan untuk beberapa projek responden. Perkhidmatan yang disediakan perayu dibuktikan melalui nota debit berjumlah RM91,184.86. Pada Mac 2014, respondent berhajat untuk mengstrukturkan semula hutang dengan mencadangkan satu skim penyusunan untuk kesemua pemiutang mengikut peruntukan di bawah s 176 Akta Syarikat 1965. Perayu kemudian memfailkan bukti keberhutangan pemiutang berjumlah RM200,000. Di bawah skim tersebut, perayu berhak untuk menuntut hutangnya berjumlah RM200,000 melalui: (a) penyelesaian bayaran secara tunai berjumlah RM56,343; (b) pemberian 1,436,574 saham-saham baru kepada responden berjumlah RM0.10 setiap satu; dan (c) waran percuma sebanyak 1,077,431. Walau bagaimanapun, responden gagal membayar kepada perayu sebanyak RM56,324.57 dalam tempoh masa yang telah ditetapkan dalam skim tersebut. Bayaran hanya dibuat pada 11 Ogos 2016 iaitu selepas writ saman untuk kes semasa telah dibuat dan penyataan tuntutan telah difailkan dan diserahkan kepada responden. Tuntutan perayu di Mahkamah Majistret Kuala Lumpur adalah untuk jumlah tunggakan bayaran sebanyak RM91,184.86. Hanya bayaran sebanyak RM3,761.37 sahaja yang dibenarkan oleh majistret. Baki tuntutan sebanyak RM87,423.49 adalah jumlah tuntutan untuk rayuan semasa.

Diputuskan, menolak rayuan dengan kos RM10,000:

(1) Tuntutan asal perayu terhadap responden adalah untuk pembayaran hutang tertunggak kepada perayu. Jumlah hutang yang disahkan oleh perayu adalah sebanyak RM200,000. Perayu tidak lagi boleh menafikan jumlah hutang seperti mana jumlah yang telah disahkan sendiri oleh perayu. Fakta yang mengatakan jumlah hutang adalah sebanyak RM91,184.86 adalah tidak termasuk dalam bukti keberhutangan perayu adalah bukan kesilapan responden, tetapi disebabkan kecuaian perayu yang terlepas pandang. Adalah jelas bahawa perayu ingin bayaran hutang dibuat sepertimana yang telah dipersetujui dalam skim tersebut, dan pada masa yang sama, perayu tidak mahu terikat dengan skim tersebut disebabkan perayu terlepas pandang jumlah hutang yang sebenar. Perayu mestilah konsisten dengan tuntutan yang dibuat. Perayu tidak boleh

A mengambil kesempatan atas kecuaian yang dilakukan oleh perayu sendiri (lihat perenggan 27–28 & 30).]

Notes

B For cases on approval by court, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1005–1012.
For cases on claim for debt, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4461–4463.

Legislation referred to

C Companies Act 1965 s 176

Dhyana Shila a/p Vasanthan (Dhyan & Co) for the appellant.
K Kandiah (Mohd Latip & Assoc) for the respondent.

D **Darryl Goon JC:**

[1] This is an appeal against the decision of the Kuala Lumpur Magistrates Court handed down on 29 August 2017. In the court's decision, the learned magistrate had granted only part of the appellant's claim, as plaintiff, against E the respondent defendant.

[2] The appellant's claim was for an amount of RM91,184.86. Only RM3,761.37 was allowed by the learned magistrate. This leaves a balance of F RM87,423.49, which is the subject matter of this appeal.

[3] There is no appeal by the respondent against the learned magistrate's decision in allowing part of the appellant's claim.

G BACKGROUND

[4] The appellant is a locally incorporated company. At the request of the respondent, the appellant had been providing services for several of the respondent's projects. The services provided were installation and/or H replacement of batteries, inverters, blocking diodes, control boards and timers. These services were provided by the appellant over a period of years between 2011 and 2013.

[5] The appellant's claim in this action is in respect of services provided, the I particulars whereof are set out in the statement of claim. The services were provided between 20 May 2013 and 28 October 2013. These services provided were evidenced by 17 debit notes amounting to a total of RM91,184.86.

[6] Sometime in March 2014, the respondent sought to restructure its

debts. It proposed a scheme of arrangement for its creditors under s 176 of the Companies Act 1965 ('scheme'). A

[7] On 15 September 2014, the appellant filed a creditors' proof of debt in respect of the proposed scheme of arrangement ('proof of debt') of the respondent. In this proof of debt, the appellant stated that the amount of debt owed to it by the respondent up to, and including, 31 August 2013 was a sum of RM200,000. B

[8] At the bottom of this proof of debt is a declaration which was signed by the managing director of the appellant. The declaration states as follows: C

> DECLARATION
>
> IN WITNESS WHEREOF, the undersigned GOH KHENG PEOW hereby attests and confirms that this Proof of Debt is accurate and complete and is being presented with respect to a legal and valid debt of the creditor against the company. D

[9] This document was not merely a form to be filled. It had also to be, and was, affirmed before a Commissioner for Oaths by the managing director.

E

[10] The scheme, when proposed, was voted on by the respondent's creditors and approved at a creditors meeting held on 18 September 2014. Under this proposal, there is what is called a 'scheme B' which is a scheme that caters for unsecured creditors. The appellant was one such creditor.

F

[11] Among the respondent's creditors who voted in favour of the scheme was the appellant. The appellant did so by submitting a voting slip dated 18 September 2014 indicating that it was in favour of 'scheme B' under the scheme of arrangement proposed. In this voting slip, the appellant also set out the value of its debt and this was stated to be RM200,000. G

[12] The scheme was finally approved by the High Court in Shah Alam on 17 December 2014.

H

[13] Under 'scheme B', the appellant, as an unsecured creditor, was entitled to settlement of its debt claimed of RM200,000 by way of:

(a) a cash settlement of RM56,343;

(b) allotment of 1,436,574 new ETI Shares (shares in the respondent) of RM0.10 each; and I

(c) 1,077,431 number of free warrants.

[14] It is not in dispute that the respondent had provided the appellant the new shares and the free warrants in accordance with the scheme. However, the respondent failed to pay the appellant the sum of RM56,324.57 within the time provided in the scheme.

[15] The sum of RM56.324.57 was only paid to the appellant on 11 August 2016. This is an agreed fact. The payment was effected vide a cheque dated 13 July 2016. This sum was paid after the writ in this action was issued and after the statement of claim dated 21 June 2016 was filed and served.

THE APPELLANT'S CONTENTION

[16] It is the crux of the appellant's case that the payment of the RM56,324.57 was made well beyond the time limited in the scheme. The effective period of the scheme set out in cl 6.5(iii) is six months from the date the scheme creditors gave approval to it. That is to say, six months from 18 September 2014 which was the date of the creditors' meeting which approved the scheme. Therefore, actual payment of the said sum of RM56,324.57 was well after the deadline set out in the scheme. Furthermore, no extension of time was ever given under cl 6.5(iii) of the scheme.

Clause 6.5 of the Scheme states as follows:

> 6.5 Other Terms Applicable to Scheme Creditors
>
> (i) ETMSB hereby undertakes to lodge an office copy of the Order of the Court sanctioning the Proposed Schemes of Arrangement with the Registrar of Companies within seven days after all approvals mentioned In Section 9.0 the Explanatory Statement have been obtained.
>
> (ii) Should ETICB defaults in payment to any Scheme Creditors under the Proposed Scheme of Arrangement, the affected Scheme Creditors is entitled to treat the Proposed Scheme of Arrangement as void and be entitled to assets all his legal rights to recover the original outstanding sum due to him less what was received if any, under the Proposed Scheme Arrangement.
>
> (iii) The Proposed Scheme of Arrangement if approved by Scheme Creditors shall be binding and effective for a period of six (6) months from the date Scheme Creditors give approval to the Proposed Scheme of Arrangement and that any extension of time after the expiry of the six month period shall be at the discretion of the Scheme Creditors.

[17] In the circumstances, and by reason of the respondent's breach in paying the RM56.324.57 beyond the time frame in the scheme, the appellant contends that the scheme is thus void as against the appellant by reason of cl 6.5(ii) of the scheme. This renders the appellant free to make any claim

including a claim for debts that it may have, prior to the scheme, but which were never stipulated in the appellant's proof of debt and not made part of the scheme.

[18] This is the rub of the matter. For the purposes of the scheme, the sum of RM91,184.86 claimed by the appellant in this action was never included in the quantification of its debts due from the respondent.

[19] From the particulars provided, this sum was already allegedly a debt due on 28 October 2013. This was well before the scheme or the appellant's proof of debt. In short, this sum of RM91,184.86 was never included in the RM200,000 claimed by the appellant in the proof of debt signed by its managing director, Goh Kheng Peow.

[20] The appellant's managing director, Goh Kheng Peow ('SP1'), testified at the trial. He quite candidly agreed that payment of the RM56,324.57 was received and accepted. However, he emphasised that payment of the RM56,324.57 was made out of the time frame provided in the scheme. He also candidly agreed that the amount claimed in this action was never taken into account or included in the RM200,000 set out in the appellant's proof of debt. The appellant had simply overlooked the debt of RM91,184.86 owed by the respondent to the appellant.

THE RESPONDENT'S CONTENTION

[21] The respondent contends that there was no breach of the terms of the scheme. There was only a delay in the payment of the RM56,324.57.

[22] The respondent further contends that the appellant had accepted the payment without any qualification. Payment of the RM56,324.57 was not accepted by the appellant on a 'without prejudice' basis.

[23] It is the respondent's submission that the appellant had received all that it was entitled to under the scheme albeit the money payment was delayed. It is contended that in the circumstances, there was in fact no breach or 'default' in respect of cl 6.5(iii) of the scheme.

[24] It is further contended that in any event, cl 6.5(ii) makes it clear that if there is any 'default', the creditor concerned may only recover the 'original outstanding sum' or whatever amount thereof that remains outstanding. The creditor, ie the appellant, is not allowed to bring claims for debts that had existed but were never identified and declared in the proof of debt.

[25] As for the sum of RM91,184.86 claimed in the action, although part of

it was allowed by the magistrate, the respondent contended that it was through the appellant's own oversight that it was not included in the proof of debt. What the appellant had stated in the proof of debt form was a declaration on oath as to the amount that is owed to the appellant.

IS THE APPELLANT ENTITLED TO THE OUTSTANDING RM87,423.49 CLAIMED?

[26] In the circumstances of this case and having regard to the provisions in the scheme, can the appellant enjoy the benefit of the scheme it voted to support and at the same time choose to be freed from it? I think not.

[27] The appellant's original claims against the respondent were for payment of monies due and owing to the appellant. The amount owed was declared by the appellant to be RM200,000. The appellant cannot now be allowed to gainsay what it had declared, on oath, to be the sum owed by the respondent. It cannot be permitted to claim debts which were already in existence before the scheme but not disclosed or declared to be owing by the respondent. This is because it is based on the amount declared by the appellant, and those declared by the other creditors of the respondent, that the respondent's debts were restructured and the scheme approved both by the creditors, including the appellant, and the court.

[28] The fact that the RM91,184.86 owed to the appellant by the respondent was not included in the appellant's proof of debt was not due to any fault on the part of the respondent. It was due to the respondent's own oversight.

[29] It is an agreed fact that the appellant received all that it was entitled to under the scheme although payment of the sum of RM56.324.57 was delayed. When the RM56,324.57 was paid to the appellant, the appellant did not make it clear that it would accept the payment conditionally or without prejudice to the claim that it was making.

[30] What is clear is that the appellant wants to keep what was paid to it under the scheme and, at the same time, wants to be freed of the scheme to be able to make claims that it had overlooked to provide for in the proof of debt. I am inclined to the view that the appellant cannot be inconsistent. This would be like running with the fox and hunting with the hounds.

[31] I construe cl 6.5(ii) of the scheme as having, in effect, two limbs. The first provides that if the respondent defaults under the scheme, the affected creditors are entitled to treat the scheme as void. The second, provides for the consequence when the scheme is treated as being void. It states that the creditor

is entitled to 'assets', which parties agree should read 'assert', all his rights to recover the 'original outstanding sum due to him less what was received if any, under the proposed scheme of Arrangement.'

[32] I agree with learned counsel for the respondent that this means if payment is not made, or not made in full, under the scheme, the scheme would be void only vis a vis the creditor concerned. As a consequence the creditor concerned may than assert its legal rights to recover the 'original outstanding sum', less sums paid if any.

[33] Although the term is not defined, the 'original outstanding sum' can only mean the sum claimed under the scheme and, in the case of the appellant, it can only mean the RM200,000 which the appellant had declared was owed to the appellant by the respondent in its proof of debt. It cannot mean any other sum that is not known to the debtor company ie the respondent. Indeed, an unknown and unclaimed sum cannot logically be referred to as an 'original outstanding sum'.

[34] In the course of oral submissions, I had asked counsel for the parties to address me as to the amount of cost that might be awarded in this case. Both counsel were in agreement that it should be a sum of RM10,000.

[35] For the reasons given above, I dismiss this appeal with costs of RM10,000.

Appeal dismissed with costs of RM10,000.

Reported by Mohd Kamarul Anwar